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No. 89-1597

In The

Supreme Court of the United States

October Term, 1989

GENERAL ACCIDENT FIRE & LIFE ASSURANCE CO.

Petitioner,

vs.

I.T.T. GENERAL CORPORATION
and
ELECTRONICS CORP. OF AMERICA

Respondents.

BRIEF OF RESPONDENT ELECTRONICS CORPORATION OF AMERICA IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTION PRESENTED

Are an insurer's subrogated causes of action under Pennsylvania law for contribution and indemnity governed by the four year limitations period contained in Pa.C.S.A. § 5525(4) governing contracts implied in law?

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COUNTERSTATEMENT OF THE CASE

The petitioner, as subrogee of its insured, filed suit for indemnity and contribution against the respondents on August 23, 1988, almost five years after judgment was entered against the petitioner's insured in a personal injury action on June 16, 1983. (The insured's appeal was resolved by settlement agreement dated October 7, 1983.) Federal jurisdiction for the petitioner's suit was based upon diversity of jurisdiction.

The district court ruled that the actions were barred by the four year Pennsylvania statute of limitations governing all contracts implied in law, and granted summary judgment. The summary judgment was upheld by the United States Court of Appeals for the Third Circuit; the petitioner's petition for rehearing was denied.

SUMMARY OF THE ARGUMENT

The application of a state statute of limitations to a state-created right of action is not an issue that places this case among the select group of cases in which certiorari discretion should be exercised. No decision reached by the Court would establish a ruling precedent on the issue.

The lower courts' alleged failure to give "proper regard" to rulings of the intermediate appellate courts of Pennsylvania is contradicted by the district court's opinion, and the petitioner's failure to cite to the district court or to the Third Circuit the cases upon which it now relies makes this case inappropriate for a claim of lack of proper regard for state rulings on state law.

The lower courts were correct in ruling that actions for contribution and indemnity are governed in Pennsylvania by a four year statute of limitations.

REASONS FOR DENYING THE WRIT

I. NONE OF THE CONSIDERATIONS GOVERNING REVIEW ON WRIT OF CERTIORARI IS APPLICABLE

Certiorari jurisdiction is exercised only when there are "special and important reasons therefor." Sup.Ct.R. 10.5. None exist in this case.

The issue presented for the Court's decision is whether the Pennsylvania statute of limitations for state-created rights of contribution and indemnity is four years or six years. No federal question is involved. Even if the Court were to devote its energies to addressing this question, its decision would not resolve the issue because determining the applicability of a state statute of limitations to a state-created right of action is a question of state substantive law to be resolved by state courts. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 62 L.Ed. 1188 (1938).

II. THE LOWER COURTS GAVE PROPER REGARD TO THE DECISIONS OF PENNSYLVANIA'S INTERMEDIATE APPELLATE COURTS IN DETERMINING THE APPLICABLE STATUTE OF LIMITATIONS

The petitioner attempts to transform a mundane question about a state statute of limitations into a matter

of federal consequence by charging that the lower courts ignored case law from intermediate appellate courts in Pennsylvania that purportedly supports application of the limitations period the petitioner desires.

The petitioner's charge is contradicted by the district court's opinion, which surveys the limited Pennsylvania case law on the issue and provides a well-reasoned basis for the district court's decision to apply a four year limitations period to the petitioner's suit. Pet. App., pp.6-7. Among other considerations, the district court relied upon the petitioner's *own assertion* that "an action for contribution is 'held to be governed by the statute of limitations applicable to actions based on implied contracts. . . .,' " Pet. App., p.7, which in Pennsylvania is a four year limitations period. 42 Pa.C.S.A. § 5525(4).

The petitioner claims that the lower courts improperly "ignored" the case of *Gabriel v. O'Hara*, 363 Pa. Super. 383, 534 A.2d 488 (Pa. Super. 1987). Pet. for Cert., p.i. The limitations period governing claims for contribution and indemnity are not discussed in *Gabriel*, even by implication. That case deals exclusively with the unique problems of determining the applicable statute of limitations for civil actions alleging violations of the Pennsylvania Unfair Trade Practices and Consumer Protection Law. Thus, the petitioner's assumption that Pennsylvania's intermediate appellate courts had formulated an "explicit standard" is incorrect. Pet. for Cert., p.i. It is impossible to reconcile the petitioner's assertion that *Gabriel* is a controlling precedent with the petitioner's failure to cite that case to the district court or to the Third Circuit in its original submission (the petitioner cited the case for the

first time in a petition for rehearing after the Third Circuit's adverse ruling).

The petitioner's own admission to the lower courts that it was appropriate to apply to these actions the statute of limitations applicable to implied contracts, and the petitioner's lack of diligence in presenting the cases that it now claims were ignored,[1] cause the petitioner's argument that the lower courts "ignored" relevant cases to ring hollow.

III. THE LOWER COURTS CORRECTLY APPLIED A FOUR YEAR STATUTE OF LIMITATIONS TO THE PETITIONER'S SUBROGATED CLAIMS FOR INDEMNITY AND CONTRIBUTION

The petitioner assigns error to the lower courts' finding that its subrogated claims for indemnity and contribution are governed by the four year statute of limitations found in 42 Pa.C.S.A. § 5525(4). The petitioner maintains that the governing statute of limitations is the six year limitations period provided by 42 Pa.C.S.A. § 5527(6). The lower courts' determination was correct and the petitioner's assertions must be dismissed for the reasons set forth below.

Indemnity claims are governed by the statute of limitations applicable to contracts. *Thermo King Corp. v. Strick*

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[1] Only two of the sixteen cases cited in the Petition for Certiorari were relied upon by the petitioner in its original submission to the Third Circuit. Seven of the sixteen cases were not even cited in its Petition for Reconsideration. None of the statutes or rules cited in the Petition for Certiorari appear in the petitioner's original submission to the Third Circuit.

Corp., 467 F. Supp. 75 (W.D. Pa.), *aff'd.* 609 F.2d 503 (3d Cir. 1979). Indeed, the petitioner conceded in its Third Circuit Brief that any rights that it may have against the respondents arise from an "implied contract of indemnity." Petitioner's Third Circuit Brief, p.10. Any "action upon a contract implied in law" such as the petitioner's subrogated indemnity claim "must be commenced within four years. . . ." 42 Pa.C.S.A. § 5525(4).

The six year limitation period proposed by the petitioner is inapplicable on its face; it applies only to actions that are "neither subject to another limitation" nor "excluded from the application of a period of limitation. . . ." 42 Pa.C.S.A. § 5527(6). The present action, based upon an implied contract of indemnity, is specifically addressed in 42 Pa.C.S.A. § 5525(4), and thus is "subject to another limitation."

The petitioner's reliance upon *Pa. Nat. Mut. Cas. Ins. Co. v. Nicholson*, 374 Pa. Super. 13, 544 A.2d 123 (1988), *alloc. denied*, 555 A.2d 116 (Pa. 1988), is misplaced. Though the contribution action in *Nicholson* was governed by the six year limitation period, *Nicholson* is inapposite because the cause of action in *Nicholson* accrued *before* 42 Pa.C.S.A. § 5525 was amended to include contracts implied in law.[2] Before that amendment, contracts

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[2] 42 Pa.C.S.A. § 5525 was amended in June 1978 to include implied contracts, with a one year grace period to June 1979. The *Nicholson* action accrued on September 15, 1977, when judgment was entered against Phillips Construction Company and Nicholson Construction Company. This date was prior to the effective date of the new four year limitations period for implied contracts.

implied in law were not subject to any express limitations period, with the result that they were governed by the six year "catch-all" provision of 42 Pa.C.S.A. § 5527(6). In the present case, there is no question whatever that the petitioner's right to a subrogated claim for indemnity accrued long after the new four year limitations period for implied contracts became effective.

The only authority that the petitioner offers to support its contention that the six year limitation period applies is a footnote in *Frangos v. Doerling Equipment Corp.*, 860 F.2d 70, 74, n.6 (3d Cir. 1988). The only legal authority pertaining to the statute of limitation for a claim of indemnity in the *Frangos* footnote is *Thermo King Corp. v. Strick Corp.*, 467 F. Supp. 75, 77 (W.D. Pa. 1979). Significantly, the *Thermo King Corp.* case was decided prior to effective date of the 1978 amendment of 42 Pa.C.S.A. § 5525 that is discussed above.[3] As a result, *Frangos* suffers the same debility as *Nicholson* as a precedent for the petitioner's position.

At the time that the petitioner's subrogated claim for an implied contract of indemnity accrued, all implied contracts were expressly governed by a four year statute of limitation. 42 Pa.C.S.A. § 5525(4). The petitioner, relying solely upon cases in which the cause of action accrued prior to relevant amendments to the statutes of limitations, fails to demonstrate that a six year limitations period should govern.

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[3] The *Frangos* opinion does not reveal when the plaintiff's action accrued, so there is no way to know whether his cause of action was governed by the pre- or post-amendment limitations periods.

The same considerations govern the petitioner's suit for contribution.[4] Pennsylvania courts have stated that an action for contribution "sounds in contract." *Pa. Nat. Mut. Cas. Ins. Co. v. Nicholson Constr. Co.*, 374 Pa. Super. 13, 18, 544 A.2d 123, 125, *alloc. denied*, 555 A.2d 116 (1988). The petitioner cited to the district court authority that contribution actions are "governed by the statute of limitations applicable to actions based on implied contracts. . . ." Pet. App., p.7. The petitioner has no basis upon which to claim now that the four year Pennsylvania statute of limitations for actions based on implied contracts was improperly applied in this case.

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[4] The petitioner did not raise any objections to the dismissal of its contribution action in its original Third Circuit submission. Its arguments were devoted exclusively to its indemnity action.

CONCLUSION

The petitioner presents for the Court's consideration an unimportant issue of state law upon which this Court cannot render a decisive ruling. The petitioner's arguments will be matters of first impression for the Court because of the petitioner's failure to present them to the lower courts. The case does not merit the attention of the nation's highest court. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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